Chapter 6
Alternative Dispute Resolution

In This Chapter...

In cases involving domestic violence and/or child abuse, concerns about safety, fairness, and abuser accountability arise, particularly for alternative dispute resolution methods such as settlement negotiation and mediation that must rely on the parties' cooperation to produce an agreement resolving the dispute. These dispute resolution methods will not produce a fair resolution unless the parties have equal bargaining power and can express their needs and concerns without fear of reprisal or intimidation. ***In cases involving domestic violence and/or child abuse, the imbalance of power between the parties, the criminal nature of the abuse, and safety concerns should lead courts to presume that cooperative dispute resolution methods such as mediation are inappropriate.*** After exploring various types of ADR, this chapter focuses specifically on the safety and fairness concerns with mediation in the context of domestic relations cases involving domestic violence.

6.1 Types of Alternative Dispute Resolution

In Michigan, "alternative dispute resolution" ("ADR")* is defined under MCR 2.410(A)(2) as:

> "any process designed to resolve a legal dispute in the place of court adjudication, and includes settlement conferences ordered under MCR 2.401; case evaluation under MCR 2.403; mediation under MCR 2.411; domestic relations mediation under MCR 3.216; and other procedures provided by local court rule or ordered on stipulation of the parties."

As the court rule indicates, ADR encompasses many different dispute resolution methods, including negotiation and settlement, mediation, and arbitration. In distinguishing the various ADR methods, it is useful to consider the degree to which the disputants rely on assistance from a neutral third party to resolve the case:

*For general information on ADR, see 1 Michigan Family Law, ch 8 (5th ed, Inst for Continuing Legal Ed,1998). ADR is also the featured subject of several articles in 79 Mich Bar J 480 et seq. (May, 2000).

- In **negotiation and settlement**, the parties typically meet face-to-face to try to reach an agreement resolving their dispute. Although there is no neutral third party to facilitate the discussion, the parties frequently engage attorneys to represent their interests. Negotiation and settlement will not result in a resolution of the parties' dispute if they are not able to reach agreement.

- In **mediation**, a neutral third party assists the parties as they work together to reach agreement.* The parties frequently have attorneys to represent them during the mediation, although this is not required. The neutral third party does not impose a solution on the parties, so that mediation will not result in a resolution of the dispute if the parties cannot agree. See MCL 552.502(*l*) ("'Domestic relations mediation' means a process by which the parties are assisted by a domestic relations mediator in voluntarily formulating an agreement to resolve a dispute concerning child custody or parenting time that arises from a domestic relations matter.")

*Some courts use "conciliation" to facilitate the parties' agreement to temporary provisions for support or access to children soon after case filing. Conciliation is similar to mediation in many respects.

- The parties to **arbitration** enter into an agreement, in which they select a neutral third party (or third-party panel) to hear their dispute and reach a decision that will be binding on them under contract principles. The parties to arbitration are typically represented by counsel, although this is not required. Because the neutral third party makes a decision for the parties, arbitration always results in a determination of their rights and responsibilities in resolving the dispute. See MCL 600.5001 et seq. and MCR 3.602 on arbitration procedure.

*See Section 6.2(C) for further discussion of arbitration.

The parties to domestic relations cases may use any of the above methods to resolve disputes. See MCR 3.216(A)(4) (parties may agree to use mediation and other settlement procedures) and MCL 600.5070-600.5075 (governing binding arbitration in domestic relations cases).*

*See Sections 1.2–1.3 on the dynamics of power and control.

In cases involving domestic violence and/or child abuse, concerns about safety, fairness, and abuser accountability arise for all of the foregoing alternative dispute resolution methods because they rely to some extent on the parties' ability to reach agreement. Courts should presume that these dispute resolution methods will not produce a fair resolution; the parties do not have equal bargaining power due to the dynamic of power and control that is the hallmark of domestic violence.* This chapter focuses on the safety and policy concerns that arise from this power imbalance in the context of mediation. On concerns with settlement agreements between the parties, see Section 4.5(C).

6.2 Types of Alternative Dispute Resolution in Michigan Domestic Relations Cases

This section discusses two types of alternative dispute resolution domestic relations cases: mediation and arbitration. In Michigan, mediation is governed by statute and by court rule:

- **MCL 552.513** requires the Friend of the Court office to "provide, either directly or by contract, domestic relations mediation to assist the parties in settling voluntarily a dispute concerning child custody or parenting time that arises from a domestic relations matter."

- **MCR 3.216** is a permissive rule that took effect August 1, 2000. It gives a court authority to order mediation of any contested issue in a domestic relations case *if* the court has first submitted a local ADR plan to the State Court Administrator for approval. MCR 3.216(B); see also MCR 2.410(B) on the contents of the local ADR plan.

The following discussion compares these two provisions.

A. Statutory Mediation Provisions for Child Custody and Parenting Time Disputes

Friend of the Court offices are required under MCL 552.513(1) to provide mediation to the parties in domestic relations matters.* This statute has limited applicability:

*See MCL 552.502(h) for a definition of "domestic relations matters."

- It applies only to mediation of *child custody* or *parenting time* disputes. The Friend of the Court office is not required to provide mediation for support, property division, or other issues.
- Mediation under the statute is strictly voluntary; the court may not require the parties to meet with a mediator.

The statute creates no express limitations on the availability of mediation for cases with special circumstances, such as cases involving domestic violence or child abuse.

MCL 552.513(3) protects the confidentiality of communications between a domestic relations mediator and the parties to mediation:

> "Except as provided in [MCL 552.513(2)],* a communication between a domestic relations mediator and a party to a domestic relations mediation is confidential. The secrecy of the communication shall be preserved inviolate as a privileged communication. The communication shall not be admitted in evidence in any proceedings. The same protection shall be given to communications between the parties in the presence of the mediator."

*This subsection exempts statements contained in final agreements that are incorporated in consent orders.

B. Court Rule Mediation Provisions

As noted, MCR 3.216 is a permissive rule authorizing a court to order parties to attempt mediation. Courts that wish to exercise this authority must first submit a local ADR plan to the State Court Administrator. MCR 3.216(C)(1) contains the following features that differentiate court rule mediation from mediation under MCL 552.513(1):

- The court rule has no limitation as to subject matter — it applies to mediation of "*any* contested issue in a domestic relations case, including postjudgment matters." [Emphasis added.]

- Mediation under the court rule may be voluntary *or* court-ordered — the court may order mediation "[o]n written stipulation of the parties, on written motion of a party, or on the court's initiative."

Unlike the domestic relations mediation statute, MCR 3.216 provides for exemptions from mediation in special cases. For example, "[p]arties who are subject to a personal protection order or who are involved in a child abuse and neglect proceeding may not be referred to mediation without a hearing to determine whether mediation is appropriate." MCR 3.216(C)(3). Additionally, parties may object to mediation on the basis of the following circumstances listed in MCR 3.216(D)(3):

> "(a) child abuse or neglect;
>
> "(b) domestic abuse, unless attorneys for both parties will be present at the mediation session;
>
> "(c) inability of one or both parties to negotiate for themselves at the mediation, unless attorneys for both parties will be present at the mediation session;
>
> "(d) reason to believe that one or both parties' health or safety would be endangered by mediation; or
>
> "(e) for other good cause shown."

An objecting party must file a written motion (and a notice of hearing) with the court and the attorneys of record within 14 days of receiving notice of the order assigning the case to mediation. MCR 3.216(D)(1). A hearing must be set within 14 days after the motion is filed, unless otherwise ordered by the court or by agreement of counsel to adjourn. *Id*.

Another unique feature of mediation under the court rule is that parties may request "evaluative mediation" in the event that they cannot reach agreement. A request for evaluative mediation may be made prior to mediation or, if the mediator is willing to provide an evaluation, at its conclusion. If the parties request evaluative mediation, the mediator will prepare a written report to the parties setting forth his or her proposed recommendation for settlement purposes only. This report must be submitted to the parties of record "within a reasonable period after the conclusion of mediation" and may not be submitted or made available to the court. MCR 3.216(I)(2). Neither the report nor the recommendations may be read by the court, relied upon by the court, or admitted into evidence without the consent of the parties. MCR 3.216(I)(6). The court cannot request the parties' consent to read the recommendation. *Id*. The parties can either accept or reject the mediator's recommendation. If they accept it, the parties can enter a judgment with the court conforming to the recommendation. MCR 3.216(I)(3). If the parties reject the recommendation and cannot agree on the remaining issues, the mediator must advise the court of the date the process was completed, of the names of the participants, and whether further ADR proceedings are contemplated. MCR 3.216(H), (I)(4). The rule imposes no sanctions on a party who rejects the mediator's recommendation. Moreover, the court may not inquire and neither the parties

nor the mediator may inform the court of the identity of a party who rejected the recommendation. MCR 3.216(I)(5).

Like the mediation statute, the court rule protects the confidentiality of communications between mediators and parties to the dispute. MCR 3.216(H)(8) provides:

> "Statements made during the mediation, including statements made in written submissions, may not be used in any other proceedings, including trial. Any communications between the parties or counsel and the mediator relating to a mediation are confidential and shall not be disclosed without the written consent of all parties. This prohibition does not apply to
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> (a) the report of the mediator under subrule (H)(6),*
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> (b) information reasonably required by court personnel to administer and evaluate the mediation program,
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> (c) information necessary for the court to resolve disputes regarding the mediator's fee, or
>
> (d) information necessary for the court to consider issues raised under MCR 2.410(D)(3) or MCR 3.216(H)(2)."*

*MCR 3.216(H)(6) requires mediators to inform the court of the status of the mediation.

*These rules address sanctions the court may impose for failure to submit materials or attend an ADR proceeding.

C. Provisions Addressing Domestic Violence in Domestic Relations Arbitration Statutes

Effective March 28, 2001, domestic relations arbitration is subject to the provisions of MCL 600.5070 - 600.5075. MCL 600.5071 provides that parties to an action for divorce, annulment, separate maintenance, child support, custody, parenting time, or to a postjudgment proceeding related to such an action may stipulate to signed binding arbitration agreement with respect to 1 or more of the following issues:

> "(a) Real and personal property.
>
> "(b) Child custody.
>
> "(c) Child support, subject to the restrictions and requirements in other law and court rule as provided in this act.
>
> "(d) Parenting time.
>
> "(e) Spousal support.
>
> "(f) Costs, expenses, and attorney fees.

"(g) Enforceability of prenuptial and postnuptial agreements.

"(h) Allocation of the parties' responsibility for debt as between the parties.

"(i) Other contested domestic relations matters." *Id.*

*The domestic relations arbitration statutes contain no definition of "domestic violence." See Section 1.2 for definitions that apply in other contexts.

In MCL 600.5072(1)(c), the Legislature has acknowledged that ***"arbitration is not recommended for cases involving domestic violence."*** [Emphasis added.]* This acknowledgment appears in a provision prohibiting a court from ordering a party to participate in arbitration unless each party acknowledges in writing or on the record that he or she has been informed in plain language of the following:

"(a) Arbitration is voluntary.

"(b) Arbitration is binding and the right of appeal is limited.

"(c) Arbitration is not recommended for cases involving domestic violence. [Emphasis added.]

"(d) Arbitration may not be appropriate in all cases.

"(e) The arbitrator's powers and duties are delineated in a written arbitration agreement that all parties must sign before arbitration commences.

"(f) During arbitration, the arbitrator has the power to decide each issue assigned to arbitration under the arbitration agreement. The court will, however, enforce the arbitrator's decisions on those issues.

"(g) The party may consult with an attorney before entering into the arbitration process or may choose to be represented by an attorney throughout the entire process.

"(h) If the party cannot afford an attorney, the party may wish to seek free legal services, which may or may not be available.

"(i) A party to arbitration will be responsible, either solely or jointly with other parties, to pay for the cost of the arbitration, including fees for the arbitrator's services. In comparison, a party does not pay for the court to hear and decide an issue, except for payment of filing and other court fees prescribed by statute or court rule for which the party is responsible regardless of the use of arbitration."

If either party is subject to a PPO involving domestic violence, or if there are allegations of domestic violence or child abuse in the pending domestic relations matter, the court is prohibited from referring the case to arbitration unless each party waives this exclusion. The exclusion cannot be waived

unless the party is represented by an attorney throughout the action (including the arbitration process). The party must also be informed on the record concerning the arbitration process, the suspension of the formal rules of evidence, and the binding nature of arbitration. MCL 600.5072(2). If a party decides to waive the exclusion from arbitration in accordance with the foregoing requirements, "the court and the party's attorney shall ensure that the party's waiver is informed and voluntary. If the court finds a party's waiver is informed and voluntary, the court shall place those findings and the waiver on the record." MCL 600.5072(3).

A child abuse or neglect matter is specifically excluded from arbitration. See MCL 600.5072(4).

An arbitrator must be an attorney in good standing with the State Bar of Michigan who has practiced for not less than five years prior to the appointment as an arbitrator and demonstrated an expertise in the area of domestic relations law. Arbitrators must also have received training in the dynamics of domestic violence and in handling domestic relations matters that have a history of domestic violence. MCL 600.5073(2).

6.3 Concerns with Mediation in Cases Involving Domestic Violence

Proponents of mediation generally note that it has the following advantages over traditional court adjudication:*

*See generally Berecz, *Family Mediation: A Horse of Many Colors,* 79 Mich Bar J 494 (2000).

- **Privacy**

  In contrast to statements made during court adjudication, communications between a mediator and the parties to a dispute are confidential. See MCL 552.513(3) and MCR 3.216(H)(8), cited in Section 6.2. This feature makes mediation a preferred dispute resolution method for parties who wish to keep the details of their relationship private.

- **Empowerment of the parties**

  In court adjudication, a judge or referee dictates how the parties' dispute will be resolved after each side has presented its case. This adversarial dynamic may serve to escalate the hostilities between the parties by producing a sense that one side has "won" and the other has "lost." Moreover, the parties have diminished control over the outcome of the dispute, which may lead them to be less than enthusiastic in following the court's orders; indeed, the "losing" party may be inclined to ignore or disobey court orders that he or she feels were imposed by the court. In contrast, agreements in mediation are reached cooperatively and represent the parties' own resolution of their dispute. Because the parties control the outcome, each party may feel that he or she has "won" and thus be more inclined to abide by the agreement.

  The parties may also feel less anxious about participating in mediation because it is a more informal process than court adjudication. Mediation

is less dependent upon substantive and procedural rules than is court adjudication and may thus be easier for parties to understand.

Finally, because it requires communication between the parties, mediation may offer them an opportunity to learn how to communicate with one another in the future in an effective, business-like manner.

- **Cost-effectiveness**

  Although mediation is not inexpensive, it is less time-consuming than court adjudication. This feature typically makes it a more cost-effective choice for the parties.

*Similar concerns apply to conciliation proceedings.

The foregoing advantages can only be gained if the mediation process operates safely and fairly. Many commentators with expertise in mediation and domestic violence have expressed skepticism that the process can work as it was intended to in light of the entrenched patterns of abuse, power, and control that are present in cases involving domestic violence. Concerns with mediation in these cases are as follows:*

- **Accountability**

*See Mich Batterer Intervention Standards, Section 7.3c, discussed in Section 3.4(B).

Domestic violence involves criminal acts. As a matter of policy, assaultive crimes should not be a subject for negotiation and settlement between the crime victim and perpetrator. When crime victims negotiate with perpetrators, it undermines the message that domestic violence is criminal conduct that society will not tolerate. Moreover, mediation sessions in which violence is negotiated may reinforce the abuser's transfer of blame for the abuse to the victim.* The National Council of Juvenile and Family Court Judges states:

> "Because assault of any kind is a serious crime and needs to be treated as such by the courts, mediation of family violence is simply not an appropriate response. Mediation is a process by which the parties voluntarily reach consensual agreement about the issue at hand. Violence, however, is not a subject for compromise. Thus, when the issue before the court is...a criminal family violence charge, mediation should not be mandated. The victim receives no protection from the court with a mediated 'agreement not to batter.' And a process which involves both parties mediating the issue of violence implies, and allows the batterer to believe, that the victim is somehow at fault." Herrell and Hofford, *Family Violence: Improving Court Practice*, 41 Juvenile and Family Court Journal 20–21 (1990).

In contrast to mediation, court adjudication is a public forum in which judges can send abusers a public message that domestic violence will not be tolerated. Judges can also hold abusers accountable by invoking enforcement powers that are unavailable to mediators. Unlike mediators, judges can issue orders that intervene in abusive behavior — orders that

can be enforced by criminal sanctions or by the contempt powers of the court.

- **Safety**

The mediation process typically requires the parties to a dispute to come into physical contact with one another. Physical proximity gives abusers the opportunity for harassment, threats, and further violence.

An abused individual's fears about safety preclude meaningful participation in mediation. One victim described the fear she experienced about mediation as follows:

> "Mediation does not take into account the fear that I, as a battered woman, have about voicing my needs in the presence of someone who has pushed me and belittled me for expressing any needs at all . . . . I endured two months of weekly meetings with the man who had knocked me to the ground, raped me, and repeatedly violated me....I felt forced to comply, to attend those sessions and thus avoid greater pain. It reminded me of nights spent silently weeping as he raped me. If I complied, the pain ended more quickly . . . . In mediation, if I'd let my ex-husband verbally intimidate me and emotionally abuse me, I wouldn't have to go to court. The trade-off was not a fair one." Hart, *Gentle Jeopardy: The Further Endangerment of Battered Women and Children in Custody Mediation*, 7 Mediation Quarterly 4 (1990), quoting Lenae, *Mediation: Psychological Brutalization*, National Coalition Against Domestic Violence Voice, p 15 (Winter, 1988).

- **Fairness**

Mediation operates fairly and effectively only when parties with equal bargaining power cooperate to achieve a mutually acceptable agreement to resolve their dispute. In cases involving domestic violence, the prerequisites of equal bargaining power and fair cooperation are absent. Instead, these cases are characterized by a one-sided exercise of power and control by the abusive party. The following comment is typical of scholars who criticize the use of mediation in cases involving domestic violence:

> "While mediation presumably requires that both parties be placed on equal footing in order to negotiate a mutually acceptable agreement the abused woman may make concessions to protect herself from further abuse. [The] balance of power in victim/abuser relationships is so weighted that the possibility of victim coercion during mediation is virtually unavoidable. Mediation, by nature, relies to some extent on the mutual goodwill and fairness of both parties. In some kinds of cases, trained mediators may be effective in equalizing the bargaining power of the parties, but they cannot compensate for a long-term pattern

in which one party has consistently controlled and manipulated the other. Indeed, the victim may even be afraid to speak up or register disagreement during a mediation session for fear of retaliation. This imbalance of power would continue after the mediation session as well, since the parties' relationship would not be altered." Goolkasian, *Confronting Domestic Violence: A Guide for Criminal Justice Agencies*, p 61 (Nat'l Inst of Justice, 1986), cited in Lemon, *Domestic Violence and Children: Resolving Custody and Visitation Disputes*, p 131 (Family Violence Prevention Fund, 1995).

6.4 Responding to Concerns About Mediation: Controversy and Consensus

Despite general agreement that domestic violence presents serious safety and policy obstacles, there is much controversy over the role that mediation can and should play in domestic relations cases where violence is a factor. This section describes the points of controversy, as well as some areas of common ground.

A. Can Mediation Ever Be Safe and Effective?

Some commentators believe that the obstacles to mediation can be overcome in certain cases where domestic violence is present. These commentators advocate screening cases for domestic violence, assessing the risks to the abused party, and — in cases deemed appropriate for mediation — taking steps to promote safety and equalize power imbalances. There is much controversy over the extent to which mediation can be safe and effective in cases involving domestic violence. The following comments reflect some of the range of opinions:

- **Some commentators reject mediation for cases involving domestic violence:**

  "[C]ompulsory and voluntary mediation and binding arbitration present overwhelming problems for domestic abuse cases. While there are safeguards which can be built into each system, the safeguards do not reach the level of protection for litigants in the courtroom." Argiroff, *Domestic Violence and Alternative Dispute Resolution: The Need for Mandatory Exemption*, Mich Family Law Journal, Special Issue, p 53, 55 (1994).

  "[M]ediation ideology and practice is incompatible with the rights and safety of victims of spouse abuse. A central tenet of mediation theorists and practitioners is that domestic violence arises out of conflict rather than the pattern of domination and control over the victim that is at its core. By focusing on future behavior, mediation ignores the relational history that is part and parcel of the abuse. Mediation is billed as an empowering, transforming process for the parties in which each participates equally. The mediator is charged with rectifying power imbalances, but, within a

culture of battering, correction of power imbalances is unlikely if not impossible. Emerging research also shows that because of mediators' orientation and training, they do not know how to respond to the signs of violence or threats of violence; thus, they transform them into procedural issues with the consequences that victims' rights are delegitimized. Finally, mediators' proclivities to develop written contracts specifying rules of future behavior may force the victim into unwanted contact with her abuser and set the stage for further violence for any perceived infraction of the rules . . . . We conclude, therefore, that mediation should not be used in cases where a culture of battering exists. While an extremely well-trained mediator might successfully use mediation in some atypical cases, viewed from a system level perspective the odds are much greater that many more victims will have their rights jeopardized." Fischer, et al, *The Culture of Battering and the Role of Mediation in Domestic Violence Cases,* 46 SMU Law Review 2117, 2172–2173 (1993).

- **Some commentators believe that mediation can succeed if the abuse is limited:**

  "Many family matters can be successfully mediated if abuse has not created an unequal balance of power. The key is to distinguish chronic abuse cases, always inappropriate for mediation, from cases of limited abuse, where the parties can bargain equally." Gerencser, *Family Mediation: Screening for Domestic Abuse*, 23 Fla St U Law Review 43 (1995).

- **Some commentators believe that mediation can be a route to empowerment and responsibility if there are adequate safeguards:**

  "The issue has evolved from whether there should be...mediation where there has been spousal abuse to whether there is present intimidation, control, or coercion that jeopardizes the abused's safety or ability to effectively negotiate in mediation. If intimidation, control, or coercion exist and cannot be effectively neutralized by representation, legal protections, and remedial therapy, then mediation should not take place. Mediation should only be allowed as a safe and empowered choice for each participant. Mediation should never be a vehicle for the perpetuation of the cycle of violence and denial. Through heightened discussion of the issues of the abuse and creative measures that protect the abused and direct parties to appropriate therapy, mediation offers successful intervention to constructively and fairly resolve the separation or divorce and to guide the parties in ending their destructive relationship." Corcoran and Melamed, *From Coercion to Empowerment: Spousal Abuse and Mediation,* 7 Mediation Quarterly 303, 314 (1990).

B. Mediation Must Be Voluntary

*The Model is available online at www.azcadv.org/PDFs/model%20code.pdf. (Last visited on January 15, 2004.)

There appears to be general consensus that mediation should never take place unless it is truly the choice of the abused individual. Moreover, there is agreement that parties should not be required to attend mediation sessions in violation of a protection order. Section 408(A) of the Model State Code on Domestic and Family Violence approved in 1994 by the Board of Trustees of the National Council of Juvenile and Family Court Judges* suggests that courts be prohibited from ordering or referring the parties to attempt mediation in the following circumstances:

> "1. In a proceeding concerning the custody or visitation of a child, if an order for protection is in effect, the court shall not order mediation or refer either party to mediation.
>
> "2. In a proceeding concerning the custody or visitation of a child, if there is an allegation of domestic or family violence and an order for protection is not in effect, the court may order mediation or refer either party to mediation only if:
>
> > (a) Mediation is requested by the victim of the alleged domestic or family violence;
> >
> > (b) Mediation is provided by a certified mediator who is trained in domestic and family violence in a specialized manner that protects the safety of the victim; and
> >
> > (c) The victim is permitted to have in attendance at mediation a supporting person of his or her choice, including but not limited to an attorney or advocate."

The commentary to this model rule notes that courts should refrain from non-mandatory referrals to mediation because "[j]udicial referrals are compelling and often viewed by litigants as the dispute resolution method preferred by the court."

Section 407(2) of the Model Code also stresses that mediation should not occur unless the abused individual desires it. This provision requires mediators to refrain from mediating court-ordered or referral cases unless the abused individual wishes to proceed:

> "A mediator shall not engage in mediation when it appears to the mediator or when either party asserts that domestic or family violence has occurred unless:
>
> > (a) Mediation is requested by the victim of the alleged domestic or family violence;

> (b) Mediation is provided in a specialized manner that protects the safety of the victim by a certified mediator who is trained in domestic and family violence; and
>
> (c) The victim is permitted to have in attendance at mediation a supporting person of his or her choice, including but not limited to an attorney or advocate."

Michigan courts have great discretion in approaching the question of mediation. Although they have the authority to refer or order the parties to mediation under MCL 552.513(1) and MCR 3.216,* they are not required to exercise it in every case. Consistent with the Model State Code, MCR 3.216 suggests that courts proceed with utmost caution in using mediation when a case involves domestic violence.

*See Section 6.2 for a more complete description of these provisions.

Under MCR 3.216(C)(3), "[p]arties who are subject to a personal protection order or who are involved in a child abuse and neglect proceeding may not be referred to mediation without a hearing to determine whether mediation is appropriate." Additionally, parties may object to mediation on the basis of the following circumstances listed in MCR 3.216(D)(3):

> "(a) child abuse or neglect;
>
> "(b) domestic abuse, unless attorneys for both parties will be present at the mediation session;
>
> "(c) inability of one or both parties to negotiate for themselves at the mediation, unless attorneys for both parties will be present at the mediation session;
>
> "(d) reason to believe that one or both parties' health or safety would be endangered by mediation; or
>
> "(e) for other good cause shown."

Because coercion is so often a factor in cases involving domestic violence, it is important that both parties receive clear, accurate information from the court about their rights to refuse or object to mediation.

C. Screening Is Essential

No matter what view one takes about the use of mediation in cases involving domestic violence, careful screening by both courts and mediators is essential. Any decision to prohibit mediation or to hedge it with safeguards must be based on an adequate understanding about the extent and nature of the violence in the parties' relationship.

Because screening is so critical, §407(1) of the Model State Code on Domestic and Family Violence gives mediators a duty to screen for domestic violence during mediation referred or ordered by a court:

> "A mediator who receives a referral or order from a court to conduct mediation shall screen for the occurrence of domestic or family violence between the parties."

The commentary to this model provision states that "[s]creening must include an assessment of the danger posed by the perpetrator, *recognizing that victims of domestic violence are at sharply elevated risk as they attempt to end the relationship and utilize the legal system to gain essential protective safeguards*." [Emphasis added.] For a discussion of lethality factors, see Section 1.5(B).

> **Note:** Some commentators who take the position that mediation should not be used in cases involving domestic violence assert that screening should be done by independent persons trained in the nature and dynamics of domestic violence rather than by representatives of mediation interests. Fischer, et al, *The Culture of Battering and the Role of Mediation in Domestic Violence Cases,* 46 SMU Law Review 2117, 2173 (1993).

Information-gathering strategies for courts are discussed in Chapter 2 of this resource book. Guidelines for mediation screening are addressed in Section 6.5; further guidelines and sample screening questions for domestic relations mediators are found in Appendixes D and E.

D. Domestic Violence Training Is Essential

Knowledge of the nature and dynamics of domestic violence is essential to identifying its presence in a case, and to promoting safety where it is a factor. Thus, domestic violence training for mediators and court personnel is essential to promoting safety in the context of mediation, regardless of a court's outlook on the use of mediation in cases where violence is present.

Suggested training for family mediators should include:*

*Ramos, *Cultural Considerations in Domestic Violence Cases: A National Judges' Benchbook*, p 3–22, 3–26 (Family Violence Prevention Fund, 1999), citing Fuller & Lyons, *Mediation Guidelines,* 33 Willamette L Rev 905, 922 (1997).

- The dynamics of domestic and family violence, including the dynamics of power and control and lethality indicators. See Sections 1.2–1.6 on this subject.
- The effects of physical and psychological abuse on family members and children. See Sections 1.7–1.8 on this subject.
- Effective techniques for implementing safety measures and safe terminations. See Sections 2.2–2.4 for suggestions on creating a safe environment.
- Appropriate referral resources used in addition to mediation. See Chapter 3 for discussion of referral agencies.
- Sensitivity to cultural, racial, and ethnic differences that may be relevant to domestic violence. Training in this area should include the support and participation of service providers to culturally diverse and minority populations. See Sections 3.5 and 6.6 for more discussion of cross-cultural concerns.

See Sections 3.1–3.2 for domestic violence service agencies that can assist a court with its training efforts.

6.5 Mediation Guidelines

As a practical matter, many cases referred to mediation involve domestic violence. This may be a result of inadequate or ineffective screening, the wishes of the abused individual, or the attitude of the referring court toward mediation in such circumstances. To promote safety, fairness, and accountability in these instances, courts and mediators can develop local mediation guidelines for cases where domestic violence is present. Indeed, the State Court Administrative Office ("SCAO") guidelines for courts submitting local ADR plans under MCR 3.216(B) require that courts address the following issues related to domestic violence:

- In domestic relations mediation programs, an ADR plan must identify how courts, mediators, and agencies (if applicable) will screen cases for domestic violence and child abuse and neglect. The guidelines recommend that during screening, courts check for PPOs, domestic violence convictions (both state and city), and child abuse/neglect convictions.
- If mediation will be ordered in domestic relations cases, an ADR plan must indicate how the court will disseminate information educating persons about identifying cases that are not appropriate for mediation.*

*See Section 6.2(B) on cases that may not be referred to mediation.

The guidelines further recommend that in designing a plan to screen cases for domestic violence and child abuse/neglect, the court should consider contacting local domestic violence coordinating councils and service agencies, the local prosecutor, the Michigan Coalition Against Domestic and Sexual Violence, legal assistance organizations, and the Domestic Violence Prevention and Treatment Board.

Further, in collaboration with other agencies, the Michigan Domestic Violence Prevention and Treatment Board has developed a Model Court Protocol for Domestic Violence and Child Abuse Screening in Matters Referred to Domestic Relations Mediation (June 29, 2001). This Model Protocol is available from SCAO's Office of Dispute Resolution.*

*The Protocol may also be found online at www.courts.michigan.gov/scao/dispute/odr.htm (Last visited January 15, 2004).

The Protocol succinctly states the major concerns with mediation in cases involving domestic violence, as follows:

> "Mediation presumes that participants can maintain a balance of power with the help of a mediator in order to reach a mutually satisfactory resolution of a dispute. The mediation process and resulting agreement can be dangerous and unfair if the imbalance of power is great or if the imbalance is unrecognized.
>
> "When domestic violence is present among parties in a dispute, the abuser's desire to maintain power and control over the victim is inconsistent with the method and objective of mediation. Fear of

the abuser may prevent the victim from asserting needs, and the occasion of mediation may give abusers access to victims, which exposes the victim, the children, and the mediator to a risk of violence.

"Mediator neutrality may support the abuser's belief that the abuse is acceptable. The future-orientation of mediation may discourage discussion of past abuse, which in turn invalidates the victim's concerns and excuses the abuser. This may result in agreements that are inherently unsafe.

"Mandatory referral to mediation by the court may communicate to the abuser and the abused that the violence is not serious enough to compromise the parties' ability to negotiate as relative equals. This message also may invalidate the seriousness of the abuse, dilute abuser accountability, and result in unsafe agreements.

"*When domestic violence is present, the case should be presumed inappropriate for mediation*.

"The decision whether to order, initiate or continue mediation should be made on a case-by-case basis.

"Parties should be fully and regularly informed that continuation of mediation is a voluntary process and that they may withdraw for any reason." [Emphasis added.]

The following resources from SCAO, other states, and national organizations may be consulted for guidance on mediation in cases involving domestic violence:

- *Screening Resources for Courts & Mediators* (SCAO, 2001). This document is reproduced in Appendix E and is available online at www.courts.michigan.gov/scao/resources/standards/odr/dvprotocol.pdf (last visited April 9, 2004).
- *Screening for Domestic Violence and Child Abuse: Divorce and Child Custody Mediation* (Women's Law Project, Pennsylvania Coalition Against Domestic Violence, 1998). This document is reproduced in Appendix D.
- Girdner et al, *Domestic Abuse and Custody Mediation Training for Mediators* (ABA Center on Children and the Law, 1999). This training curriculum for mediators includes six three-hour training modules with notes for instructors, small-group and roleplay exercises, presentation slides, and handout materials. Topics covered include: introduction to domestic abuse; children, domestic abuse, and parenting plans; screening for domestic abuse; terminating safely; and conditional mediation. Project consultants include Barbara Hart and Richard Tolman.
- *Mediation of Family Disputes Involving Domestic Violence: Report of the AFM Task Force on Spousal and Child Abuse* (Academy of Family Mediators, 1998). This report addresses some of the issues

involved in determining which case may be appropriate for mediation and offers recommendations regarding ways to safeguard the physical safety and legal rights of all parties. It is intended for educational purposes only and is not intended as an AFM policy.

- Fuller and Lyons, *Mediation Guidelines,* 33 Willamette Law Review 905 (1997). This article offers commentary on and the full text of guidelines for the use of mediation in family law developed by the Mediation Work Group of the Oregon Domestic Violence Council.

6.6 Cross-Cultural Considerations in Mediation

As noted in Section 6.3, the dynamic of power and control in relationships involving domestic violence prevents the abused individual from participating safely and meaningfully in mediation. Measures to overcome the obstacles created by domestic violence will not be effective unless they reflect an awareness of cultural considerations for the parties. Cultural issues to address include:*

*Ramos, *Cultural Considerations in Domestic Violence Cases: A National Judges' Benchbook*, p 3-24–25 (Family Violence Prevention Fund, 1999).

- Can the mediator conduct the mediation in the primary language spoken by the abused individual? If not, has the mediator arranged for an interpreter?
- Is there a cost for mediation? If so, are fee waivers available for low-income persons?
- Is the mediator of the same race, ethnicity, religion, or sexual orientation as the parties? If not, have the parties been asked if they have a preference as to the background of the mediator? Has co-mediation been explored where parties of different backgrounds feel strongly about having a mediator who shares their background?
- Has co-mediation been explored where the parties feel strongly about having a mediator of their same gender?
- Can both parties read English or another language? If literacy is a challenge for a party, is the mediator aware that any written agreements should be read out loud to the parties before asking one of them to sign or agree to it?

Mediators who are culturally aware understand the following:*

Id. at 3–26.

- Their own biases and stereotypes, and how biases and stereotypes generally can influence screening for abuse and the mediation process.
- The importance of avoiding assumptions about clients' values, habits, interests, needs, and socialization.
- The effects of social and/or cultural isolation. These effects may relate to health care, fear of deportation, employment, access to services, community contacts, and personal rights under the law.
- Cultural differences can affect the meaning of nonverbal communication.

- In cross-cultural situations, abused individuals may be particularly affected by issues related to housing, public assistance, immigration, refugee policies, and legal aid policies.

Further discussion of cross-cultural communication appears at Section 3.5.